(1) 90-1767

No.

FILED
MAY 16 1991
OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1991

PONDER R. FANNIN, - - - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER WITH APPENDIX

LOWELL W. LUNDY
P. O. Box 280
Barbourville, Kentucky 40906
Phone: 606-546-4162
Attorney for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3281, LOUISVILLE, KY.

The Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit rendered on March 26, 1991.

QUESTION PRESENTED FOR REVIEW

Did the decision by the United States Court of Appeals for the Sixth Circuit erroneously decide that 28 USC 1738, does not require the courts of the United States to give full faith and credit to the judgments of the courts of states where, as in this case, the question whether the Petitioner had fallen and injured himself in a slip and fall case had been determined by trial and judgment (and pursued through the appellant courts of Kentucky) and became a final judgment of a state court. Any question by the United States Court whether the petitioner fell and injured himself in a criminal prosecution using the mail in a scheme to defraud was precluded by the judgment of that state court and he submits that the Federal District Court did not give full faith and credit to the state judgment.

PARTIES TO THE PROCEEDING

All the parties to this proceeding are set forth in the caption to the case before this Court.

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Reference to Opinions	1
Statement of Jurisdiction	1– 2
Statement of the Case	2– 4
Arguments and Reasons for Granting the Writ of Certiorari	5–10
Conclusion	10–11
Proof of Service	11
Appendix	1a–4a

TABLE OF AUTHORITIES

Cases: PAGE

Allen v. *McCurry*, 449 U.S. 90 ..... 8, 9
Christmas v. *Russell*, 72 U.S. 2 8
Kremer v. *Chemical Construction Corp.*, 456 U.S. 461 7
Mills v. *Duryee*, 7 Cranch 481, (1813) 8
McElmoyle v. *Choen*, 13 Pet. 312, 326 (1839) 8
Sealfon v. *United States*, 332 U.S. 575 5
Stone v. *Powell*, 428 U.S. 465 9
United States v. *Oppenheimer*, 242 U.S. 85 5
Yates v. *United States*, 354 U.S. 298 5
Restatement of Judgments, Sec. 86 6
Restatement of Judgments, 2d, Sec. 86 6

Statutes and Rules:

18 U.S.C. Sec. 1314 2
28 U.S.C. Sec. 1738 5

No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1991

PONDER R. FANNIN, -- - - - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER WITH APPENDIX

REFERENCE TO OPINIONS

Decision by the United States Court of Appeals for the Sixth Circuit was filed on March 26, 1991 and styled United States of America v. Ponder R. Fannin, No. 90-5809. The decision affirms the Judgment of the United States District Court for the Eastern District of Kentucky at London. The decision of the Sixth Circuit may be found in Appendix, Pages 0a - 0a.

STATEMENT OF JURISDICTION

The filing date of the decision of the United States Court of Appeals for the Sixth Circuit of which review is sought in this case is March 26, 1991.

Jurisdiction is conferred upon this Court to review by writ of certiorari the appellate decision question by 28 U.S.C. 1254(1).

This Court should grant the writ of certiorari under the authority of Rule 17.1(a) and (c) of this Court.

Here the Sixth Circuit reasoned that because the United States was not a party to what it contends was a fraudulent slip and fall civil action in a state court action it had no opportunity to litigate the issue of fraud (i.e. did the petitioner actually fall and injure himself) and thus was not precluded from litigating the issue of mail fraud when summons was sent through the mail in the civil action.

STATEMENT OF THE CASE

The petitioner, Ponder R. Fannin, was charged in a two count indictment under 18 USC Sec. 1341 with knowingly causing the mails to be used in a scheme to defraud. After a jury trial he was found guilty in the United States District Court for the Eastern District of Kentucky on Count One and acquitted on the other count. He was sentenced to four (4) years imprisonment and required to make restitution to K-Mart in the amount of any judgment which is still being held by the state court.

The indictment charges that the defendant devised a scheme to defraud in that he staged and faked a personal injury accident at the K-Mart Store in Hazard, Kentucky after having caused oil to be spilled on the floor of the store and he intentionally slipped and fell. As a result of what the United States contends was a staged accident, Fannin pretended to be hurt, and caused a civil action to be filed against K-Mart in the Perry (County, Kentucky) Circuit Court, seeking damages in the amount of $276,000 from the K-Mart Corporation.

On September 27, 1983, Ponder Fannin, was a customer in the K-Mart Store, in Hazard, Perry County, Kentucky. He slipped on some oil on the floor, fell and injured his

back. He sued K-Mart. The jury awarded him a substantial sum of money. K-Mart appealed to the Kentucky Court of Appeals which affirmed the judgment. K-Mart then unsuccessfully sought discretionary review in the Kentucky Supreme Court.

Therefore, whether Ponder Fannin fell and sustained injuries, etc., as he claimed in the case tried in the Perry Circuit Court became adjudicated facts, and they remain so to this day.

The indictment in the United States District Court came about when one Larry Luttrell convinced a local FBI Agent, Wilburn R. "Rod" Kincaid, that with his assistance he could uncover "official corruption" in Perry County, Kentucky, and incidentally seine up some drug cases for the United States. He was put on the payroll of the FBI, so to speak, and began working undercover. At that time, however, Luttrell was under indictment in the Perry County Circuit Court for trafficking in cocaine.

Part of Luttrell's undercover activity for was to record conversations of different persons. In some of those conversations the petitioner, Fannin, tells Luttrell that if Luttrell will get him $35,000 he can take care of the Perry Circuit Judge and have Luttrell's indictment either dismissed, or, if he pleads guilty, receive a probated sentence. There are several of these conversations about Luttrell paying Fannin to buy, bribe or corrupt the circuit judge. [Vol. II, Pg. 111-112]

During one of these conversations, while in an expansive mood, Ponder tells Luttrell that his slip and fall case against K-Mart was a fraudulent, or bogus case; that he had a friend pour oil on the floor and he faked the fall and his injuries.

That conversation was recorded and is the basis of this indictment charging Ponder with knowingly causing the mails to be used in a scheme to defraud K-Mart.

That tape is interspersed with smut and trashy talk sometimes exchanged between men with foul mouths when they are conversing among themselves. But in general Fannin tells Luttrell that he had a friend puch a hole in a can of oil, spill it on the floor and Fannin slipped and fell.

The case was tried in the Perry Circuit Court at Hazard, Kentucky and Fannin was awarded $45,000. Thereafter K-Mart filed a motion for a Judgment NOV [Vol. I, Pg. 98, Ln. 1-3], which was overruled. [Vol. I, Pg. 99, Ln. 1-17] Judgment was entered on the verdict for $45,000 with interest at 12% per annum.

K-Mart appealed to the Kentucky Court of Appeals. A panel of that Court affirmed the judgment and the Petition for Rehearing was denied. [Vol. II, Pg. 58-59]

K-Mart filed a motion for Discretionary Review in the Kentucky Supreme Court. The motion was denied on August 30, 1988. [Vol. II, Pg. 60]

At this point there was and is a final judgment in the case of Ponder Fannin v. K-Mart.

The indictment in this case rests upon the extrajudicial recorded statement made by the petitioner to Larry Luttrell. The real question to be decided in the case is not if the mail was used, but did Ponder Fannin actually slip and fall and injure himself or did he fake the fall and fraudulently claim to be injured.

ARGUMENTS AND REASONS FOR GRANTING THE WRIT OF CERTIORARI

28 USC 1738, requires the Courts of the United States to give full faith and credit to the judgments of the states. In this case, the question whether the petitioner fell and injured himself had been determined by trial, verdict and judgment. The case was appealed through the appellant court of Kentucky. It was a final judgment and the questions in dispute had been resolved in favor of the petitioner.

The question here is the effect of a State Court Judgment in a subsequent criminal action in Federal Court.

In the case of *Yates* v. *United States,* 354 U.S. 298, 1 L.Ed.2d 1356, 77 S.Ct. 1064, this Court said:

> "We are in agreement with petitioner that the doctrine of collateral estoppel is not made inapplicable by the fact that this is a criminal case, whereas the prior proceedings were civil in character. *United States* v. *Oppenheimer,* 242 U.S. 85, 61 L.Ed. 161, 37 S.Ct. 68, 3 ALR 516. We agree further that the nonexistence of a fact may be established by a judgment no less than its existence; that, in other words, a party may be precluded under the doctrine of collateral estoppel from attempting a second time to prove a fact that he sought unsuccessfully to prove in a prior action." *Sealfon* v. *United States,* 332 U.S. 575, 92 L.Ed. 180, 68 S.Ct. 237.
>
> * * *
>
> "That doctrine makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision.
>
> * * *
>
> The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of

the ultimate facts in issue in the subsequent proceeding. So far as merely evidentiary or "mediate" facts are concerned, the doctrine of collateral estoppel is inoperative. *The Evergreens* v. *Nunan* (CA2d) 141 F.2d 927, 152 ALR 1187; Restatement of Judgments Sec. 68, comment p. ....."

In the *Restatement of Judgments* 2d, Sec. 86, which deals with "Effect of State Court Judgment in a Subsequent Action in Federal Court" states:

"A valid and final judgment of a state court has the same effects under the rules of res judicata in a subsequent action in a federal court that the judgment was rendered, except that:

(1) An adjudication of a claim in a state court does not preclude litigation in a federal court of a related federal claim based on the same transaction if the federal claim arises under a scheme of federal remedies which contemplates that the federal claim may be asserted notwithstanding the adjudication in state court; and

(2) A determination of an issue by a state court does not preclude relitigation of that issue in federal court if according preclusive effect to the determination would be incompatible with a scheme of federal remedies which contemplates that the federal court may make an independent determination of the issue in question."

The comments under Section 86 state:

"c. General rule. Federal statute, 28 U.S.C. Sec. 1738, provides that state court judgments shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken.'

> This statute is construed to govern the recognition of a state court judgment not only in the courts of another state but also in the federal courts. Under the statute, to determine the effect of a state court judgment in subsequent state or federal litigation, reference is to be made to the law of the state in whose courts the judgment was rendered. The provisions of 28 U.S.C. Sec. 1738 have been in effect since 1790, and are incorporated by Subsection (1) of this Section. It is probable that, given the Full Faith and Credit Clause of the Constitution, the rule would be the same independent of the statute, but the question is unlikely ever to arise.
>
> * * *
>
> Whether a scheme of federal remedies implies an exception to 28 U.S.C. Sec. 1738 in any particular case is a matter of statutory interpretation. However, the intention of Congress to make such an exception should not be readily inferred. The values underling the rule of finality are, generally speaking, no less when the judgment is that of a state court challenged in federal court than in any other context of recognition. Furthermore, whenever a state court judgment is refused an effect with which it would otherwise be endowed, some stress is imposed on the relations of mutual respect that properly characterize the federal legal system.
>
> * * *

In *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 72 L.Ed.2d 262, 102 S.Ct. 1883 (1982), in which the Supreme Court considered the preclusive effect to be given to a state court's review of the state agency's action on job bias claim upon a later action in Federal Court on the same claim under similar federal law, and concluded that 28 U.S.C. Sec. 1738, required preclusive effect, the Court stated:

"Our previous decisions have not specified the source or defined the content of the requirement that the first adjudication offer a full and fair opportunity to litigate. But for present purposes, where we are bound by the statutory directive of Section 1738, state proceeding need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guarantee by federal law. It has long been established that Sec. 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken. *McElmoyle* v. *Choen,* 13 Pet. 312, 326, 10 L.Ed. 177 (1839); *Mills* v. *Duryee,* 7 Cranch 481, 485, 3 L.Ed. 411 (1813). As we recently noted in *Allen* v. *McCurry, supra,* 'though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments wherever the courts of the State from which the judgments emerged would do so." 449 U.S., at 96, 66 L.Ed.2d 308, 101 S.Ct. 411.

This Court held in *Christmas* v. *Russell,* (1866) 72 U.S. 290, 18 L.Ed. 475, that the plea of fraud was not a valid defense by a debtor to a creditor's suit in federal court brought to enforce a prior state court judgment. Recognizing the rule that federal courts must give preclusive effect to prior state court judgments, the Court found that the judgment was conclusive between the parties in the courts of the state in it was rendered, and therefore must also be conclusive in the federal court, stating that unless the merits were open to exception in trial between the

parties, it was difficult to see how the plea of fraud could be admitted as an answer to the action.

In *Allen* v. *McCurry,* 449 U.S. 90, 66 L.Ed.2d 308, 101 S.Ct. 441 (1980), this Court again addressed the problem of collateral estoppel in a way which is instructive to the question raised in this case. Quoting from the Syllabus by the Reporter of Decisions:

> "At a hearing before respondent's criminal trial, a Missouri court, denied in part, respondents motion to suppress, on Fourth and Fourteenth Amendment grounds, certain evidence that had been seized by the police. Respondent was subsequently convicted, and the conviction was affirmed on appeal. Because he did not assert that the state courts had denied him a 'full and fair opportunity' to litigate his search-and-seizure claim, respondent was barred by *Stone* v. *Powell,* 428 U.S. 465, 49 L.Ed.2d 1067, 96 S.Ct. 3037, from seeking a writ of habeas corpus in a federal district court. Nevertheless, he sought federal court redress for the alleged constitutional violation by bringing a suit for damages under 42 U.S.C. Sec. 1983 against the officers who had seized the evidence in question. The Federal District Court granted summary judgment for the defendants, holding that collateral estoppel prevented respondent from relitigating the search-and-seizure question already decided against him in the state courts. The Court of Appeals reversed and remanded, noting that *Stone* v. *Powell, supra,* barred respondent from federal habeas corpus relief and that the Sec. 1983 suit was, therefore, respondent's only route to a federal forum for his constitutional claim, and directed the trial court to allow him to proceed to trial unencumbered by collateral estoppel.
>
> Held: The Court of Appeals erred in holding that respondent's inability to obtain federal habeas corpus

> relief upon his Fourth Amendment claim renders the doctrine of collateral estoppel inapplicable to his Sec. 1983 suit. Nothing in the language or legislative history of Sec. 1983 discloses any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights. Nor does anything in Sec. 1983's legislative history reveal any purpose to afford less deference to judgments in state criminal proceedings than to those in state civil proceedings."

Should Federal Court be permitted to ignore the litigated findings of facts of the Perry Circuit Court? The petitioner respectfully submits it should not be permitted to do so.

The decision of the Court of Appeals for the Sixth Circuit is not a correct statement of the law. It would appear to abrogate the plain meaning of the language and intention of the applicable statute.

CONCLUSION

For the foregoing reasons the petitioner respectfully requests this Honorable Court to grant the petition for Writ of Certiorari in this case in order to rectify the misinterpretation and misapplication of the law as stated by the United States Court of Appeals. Questions by the United States Court whether the petitioner fell and injured himself raised in a criminal prosecution for using the mail in a scheme to defraud was precluded by the judgment of the state court and he submits that the Federal District Court did not give full faith and credit to the state judgment.

Respectfully submitted,

LOWELL W. LUNDY
P. O. Box 280
Barbourville, Kentucky 40906
Phone: 606-546-4162

Counsel for Petitioner

PROOF OF SERVICE

I, Lowell W. Lundy, counsel for the Petitioner, hereby certify that three copies of the foregoing Petition for Writ of Certiorari were mailed postage prepaid this 14 day of May, 1991, to The Solicitor General, Department of Justice, Washington, D.C. 20530; and the United States Attorney, P.O. Box 1490, Lexington, Kentucky 40591.

LOWELL W. LUNDY
P. O. Box 280
105 Knox Street
Barbourville, Kentucky 40906
Phone: 606-546-4162

Counsel for Petitioner

APPENDIX

No. 90-5809

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
See Sixth Circuit Rule 24

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellant,*

v.

PONDER R. FANNIN, - - - *Defendant-Appellee.*

On Appeal from the United States District Court for the Eastern District of Kentucky

---

Decided and Filed March 26, 1991

BEFORE: NELSON and SUHRHEINRICH, Circuit Judges, and HACKETT, District Judge.

PER CURIAM. This is an appeal by the defendant, Ponder R. Fannin, from a mail fraud conviction under 18 U.S.C. § 1341. For the reasons discussed below we shall affirm the conviction.

I

During the course of a federal investigation of political corruption in Eastern Kentucky, Mr. Fannin made the mistake of bragging repeatedly to undercover FBI agents about how he staged a slip-and-fall accident at a local

---

*The Honorable Barbara Hackett, United States District Judge for the Eastern District of Michigan, sitting by designation.

K-Mart store and recovered a substantial judgment against K-Mart in a Kentucky court. (The FBI surreptitiously tape recorded one of the incriminating conversations, and there is little room for doubt about what Mr. Fannin actually said.) The summons and complaint in Mr. Fannin's fraudulent suit were sent to K-Mart's registered agent in Louisville by U.S. Mail, a circumstance that led the U.S. Attorney's office to prosecute Mr. Fannin under the mail fraud statute.

On appeal Mr. Fannin argues that his conviction ought to be reversed because (1) his confession was not sufficiently corroborated to be trustworthy; (2) the Kentucky court judgment necessarily determined that there was no fraud, which determination ought to bind the federal courts pursuant to 28 U.S.C. § 1738; and (3) he could not reasonably have anticipated that the mail would be used in perpetrating the fraud. We find none of these arguments persuasive.

II

The United States Supreme Court has made it clear that a criminal conviction cannot be based on an extra-judicial confession without sufficient extrinsic evidence to establish the trustworthiness of the confession. *Opper* v. *United States,* 348 U.S. 84, 93 (1954). Corroboration, however, need not include independent proof of each element of the offense. As this circuit has held,

> "[t]he purpose of corroboration is to ensure the reliability of the confession or admission of the accused. Thus, the requirement is only that there by extrinsic evidence corroborating the admission as a whole which, taken together with the admission, is sufficient to support a finding of guilt beyond a reasonable doubt. If there is extrinsic evidence tending to corroborate the confession, the confession as a whole is admissible, and

> some elements of the offense may be proven entirely on the basis of a corroborated confession." *United States* v. *Trombley,* 733 F.2d 35, 37-38 (6th Cir. 1984) (citations omitted).

In the case at bar the government submitted ample extrinsic evidence to corroborate Mr. Fannin's confession: K-Mart employees corroborated virtually every detail of Mr. Fannin's "fall"short of seeing him turn his shopping cart over and lie down on the floor; the incriminating tape spoke for itself; one of the FBI agents testified that Mr. Fannin had recited the same story the day before the confession was recorded; and other witnesses testified as to the history of Mr. Fannin's negligence suit in the state courts. The evidence was more than sufficient to make the confession trustworthy.

Mr. Fannin fares no better with his 28 U.S.C. § 1738 argument. That statute requires the federal courts to give a state court judgment the same preclusive effect it would be given by the state in which the judgment was rendered. *Barnes* v. *McDowell,* 848 F.2d 725, 730 (6th Cir. 1988), *cert. denied,* 488 U.S. 1007 (1989). Mr. Fannin asserts that the Kentucky courts implicitly found that his fall was genuine, and that this finding ought to bind the federal courts. The United States was not a party to the action in the Kentucky courts, however, and had no opportunity to litigate the relevant issues there. Not having been a party to the civil action, the United States would not have been precluded from subsequently litigating the issue of fraud in a Kentucky court. Thus it was not precluded from litigating the issue in the federal court.

Mr. Fannin's third and final claim is that there was insufficient evidence to support the jury's findng that he knowingly made use of the mail to perpetrate the fraud. In order to prove *scienter,* however, the United States had to

show only that it was reasonably foreseeable that the mail would be used in furtherance of the fraud. *United States* v. *Henson*, 848 F. 2d. 1374, 1380 (6th Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989). (*Henson* involved an odometer roll-back scheme. Although the defendants in *Henson* never mailed anything and had no actual knowledge that their bank was mailing checks related to the scheme, the court found it reasonably foreseeable that the bank would mail the checks. That was enough.)

In the instant case it was readily foreseeable that the mail would be used to serve process on K-Mart. The use of the mail to notify a defendant of a lawsuit is common in both the state and federal courts. K-Mart's statutory agent might have been served by hand, to be sure, but Mr. Fannin had no reason to suppose that the more expensive method would be chosen over the less expensive one.

AFFIRMED.